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ALEXANDER L. STEVAS,
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No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

SOUTHERN PACIFIC TRANSPORTATION CO.
Appellant,

v.

PUBLIC UTILITIES COMMISSION
OF CALIFORNIA, et al.,
Appellees.

SOUTHERN PACIFIC TRANSPORTATION CO. et al.,
Appellants,

v.

PUBLIC UTILITIES COMMISSION
OF CALIFORNIA, et al.,
Appellees.

On Appeal from the Supreme Court of California

Jurisdictional Statement—State Civil Case

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December 13, 1983

QUESTIONS PRESENTED**I.**

Can a state which failed to seek certification to continue regulating intrastate rail transportation under the Staggers Rail Act of 1980 nevertheless order and require an interstate railroad to provide intrastate rail passenger service?

II.

Can California punish a railroad and two of its managing officers for later suspending that service under a right conferred in the tariff which the railroad was required to file with the Interstate Commerce Commission for the service?

LIST OF CORPORATE SUBSIDIARIES AND AFFILIATES

The parent company of Southern Pacific Transportation Company is Southern Pacific Company. The partially owned subsidiaries and affiliates of Southern Pacific Transportation Company are:

- St. Louis Southwestern Railway Co.
- The Ogden Union Railway & Depot Co.
- Portland Traction Company
- Portland Terminal Railroad Co.
- Sunset Railway Company
- Central California Traction Company
- Trailer Train Company

The wholly and partially-owned subsidiaries and affiliates of St. Louis Southwestern Railway Co. are:

- Alton & Southern Ry. Co.
- Arkansas & Memphis Ry. Bridge & Terminal Co.
- Dallas Terminal Ry. & Union Depot Co.
- St. Louis Southwestern Ry. Co. of Texas
- Southern Illinois & Missouri Bridge Co.
- Southwestern Transportation Co.
- Terminal R.R. Association of St. Louis
- Glascar Inc.
- Main Street Warehouse Company
- The Southwestern Town Lot Corp.
- Kansas City Terminal Railway Co.
- Trailer Train Company

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Jurisdictional Statement—State Civil Case

OPINIONS BELOW

These appeals are from decisions of the California Supreme Court. The first, entered August 18, 1983, in S.F. No. 24525, upheld an assertion of continuing and exclusive California jurisdiction over intrastate rail passenger service, notwithstanding the preemption of state authority in the Staggers Rail Act of 1980. App. at 1a. The second, entered September 14,

1983, in S.F. No. 24573, refused to annul or set aside an order punishing for contempt Southern Pacific Transportation Company and two of its managing officers for suspending intrastate rail passenger service pursuant to a right provided by a tariff on file with the Interstate Commerce Commission.¹ App. at 2a.

The two California Supreme Court decisions are memorialized only by minute orders denying review, without comment or explanation. Such orders are deemed denials on the merits of all claims raised, and an appeal may appropriately be taken, even though the basis for the court's decision is not explained. *Napa Valley Co. v. R.R. Comm.*, 251 U.S. 306, 373 (1920).

The cases arise from the same continuing California controversy, involve identical or closely related issues, and are appealed from the same court. The time for docketing the joint appeal was extended to and including December 13, 1983, by order of Justice William H. Rehnquist, dated October 25, 1983.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under 28 U.S.C §1257(2).

The California Supreme Court's denials of review, August 18, 1983, in S.F. No. 24525, and September 14, 1983, in S.F. No. 24573, constitute final judgments by the highest court of California that the Staggers Act does not apply to intrastate rail passenger service in California.

¹ The parties to the proceeding in S.F. No. 24525 are Southern Pacific Transportation Company, petitioner, Public Utilities Commission of California and the individual members thereof, respondents, and Department of Transportation, State of California, real party in interest. The parties to the proceeding in S.F. No. 24573 are Southern Pacific Transportation Company, Denman K. McNear, and William S. Weber, petitioners, and Public Utilities Commission of California and the individual members thereof, respondents.

STATUTORY PROVISIONS

The following statutory provisions are set forth in the Appendix at 274a to 286a:

Interstate Commerce Act, as amended by The Staggers Rail Act of 1980, P.L. 96-448, 94 Stat. 1895. 49 U.S.C. §§ 10101a, 10102(21), 10102(25), 10501(c)(1), 11501(b)(1), 11501(b)(2), 11501(b)(3)(A), 11501(b)(4)(A).

Staggers Rail Act of 1980, P.L. 96-448, 94 Stat. 1895, § 3. California Civil Code § 2169.

California Public Utilities Code, §§ 486, 761-763, 2113.

STATEMENT OF THE CASE

A. Commencement of This Litigation: May 1978.

On May 18, 1978, the County of Los Angeles ("County") and Department of Transportation, State of California ("CalTrans"), petitioned the Public Utilities Commission of California ("PUC") for an order directing Southern Pacific Transportation Company ("SP"), an interstate railroad, to start an intrastate commuter passenger train service between Oxnard and Los Angeles, both in California.

The four proposed commuter trains would be operated on SP's Coast main line which is primarily single track, lacks modern remote-controlled electronic, or "centralized traffic control" dispatching machinery, and provides the sole access by rail to major Los Angeles industries. County and Caltrans required that the commuter trains should receive highest priority on this track. They were unwilling to pay for any capital improvements to minimize the displacement of existing rail services.

B. Initial Decision by the PUC: June 1980.

Hearings were held by the PUC, at which SP appeared and vigorously opposed the proposal, but on June 3, 1980, the PUC decided that the requested service should be started. Decision 91847, 3 Cal.PUC 2d. 769, App. at 3a. However, the PUC's implementing order was stayed prior to its effective date; SP's petition for rehearing was granted, and the matter was reopened for receipt of further evidence. Decision 92230 (September 30, 1980) (unreported), App. at 66a. The grant of rehearing meant that the original proceedings were still open, for "rehearing is merely a continuation of the *same* proceeding for the receipt of any additional evidence or argument that may be offered by any party or for further consideration by the Commission." *George F. Pearce*, 63 Cal.PUC 587, 588 (1964) (emphasis in original).

As of the time that the PUC rendered Decision 91847 in June 1980, Sections 762 and 763 of the Public Utilities Code empowered the PUC to order new rail passenger service, and the fact that it would be unprofitable did not, standing alone, provide a basis for challenge under the California or United States constitutions. *Southern Pac. Co. v Public Utilities Commission*, 41 C.2d 354, 366, 260 P.2d 70, 78 (1953); *app. diss.*, 346 U.S. 191 (1954).

C. Passage of the Staggers Rail Act: October 1980.

While the proceedings were still open before The PUC, Congress, responding to mounting concerns of over-regulation of the railroad industry at both state and national levels, made sweeping changes in the Interstate Commerce Act. The Staggers Rail Act of 1980 ("Staggers"), PL 96-448, 94 Stat. 1895, enacted October 14, 1980, with an effective date of October 1, 1980, required states to abandon local concepts of regulation and to become administrators of federal policy in regulating intrastate services. States that were unwilling to assume this role had the choice of deregulating intrastate rail services, or of turning over the regulatory reins to the Interstate Commerce Commission ("ICC").

1. *The Purpose of the Staggers Act.* Staggers was designed to free the railroads from the shackles of over-regulation and to allow them to manage their properties as would a conventional business, in order that the railroad industry could achieve adequate revenues for the services they performed and thereby improve the financial stability of the national rail system in the private sector.

Its goals are stated to be: "The purpose of this Act is to provide for the restoration, maintenance and improvement of the physical facilities and financial stability of the rail system of the United States. . . ." Staggers Rail Act of 1980, PL 96-448, 94 Stat. 1895, § 3.

Implementing these goals was a revised rail transportation policy which provided:

"In regulating the railroad industry, it is the policy of the United States Government—

"(1) To allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail." 49 U.S.C. § 10101a.

Extensive debate over the balancing of railroad versus customer needs resulted in the decision to deregulate railroad business under a specific statutory test. Regulatory intervention would be permitted *only* where there was a lack of effective competition—a condition which the Act referred to as "market dominance" by the railroads. Even then, the power to reduce rates was circumscribed by recognition of railroad revenue needs.

2. *The Preemption of the Staggers Act Over Intrastate Rail Transportation.* The role of the states in regulating intrastate transportation was one of great concern to Congress. On the one hand was Congress' traditional reluctance to interfere with the states in their regulation of intrastate commerce, and, on the other hand, there was recognition that the freedoms which Congress sought to confer upon the railroad industry could be frustrated if states compelled the railroads to devote their plants to profitless state transportation services.

This issue was resolved in Section 214 of the Staggers Act,* which amended the Interstate Commerce Act by wholly recasting prior state-federal relationships. Section 214 permitted states to retain a role in the regulation of intrastate rail commerce *only* if they did so as administrators of federal policy. Specifically, it provided that states "may only exercise jurisdiction over intrastate transportation . . . if such state authority exercises such jurisdiction *exclusively in accordance with the provisions of [the Interstate Commerce Act]*." (emphasis added). 49 U.S.C. §11501(b)(1). States desiring to continue to exercise jurisdiction were required to apply to the ICC for certification of their standards and procedures. 49 U.S.C. §11501(b)(2). Any state authority which was denied certification, or which did not seek certification "*may not exercise any jurisdiction over intrastate rates, classifications, rules and practices until it receives certification.*" (emphasis added). 49 U.S.C. §11501(b)(4)(A).

The Conference Report explained the purpose of these provisions:

"The conferees' intent is to ensure that the price and service flexibility and revenue adequacy goals of the Act are not undermined by state regulation of rates, practices, etc., which are not in accordance with these goals. *Accordingly, the Act preempts state authority over rail rates, classifications, rules and practices.* States may only regulate in these areas if they are certified under the procedures of this Section.

The remedies available against rail carriers with respect to rail rates, classifications, rules and practices are exclusively those provided by the Interstate Commerce Act, as amended, and any other federal statutes which are not inconsistent with the Interstate Commerce Act. No state law or federal or state common law remedies are available." House Conference Report No. 96-1430, 4 U.S. Code Cong. & Ad. News 4110 (96th Cong., 2d Sess. 1980), p. 106. (emphasis added).

* Section 214 has been codified in relevant part in 49 USC 10501 and 49 USC 11501.

3. *The Staggers Act State Certification Procedure.* Preemption of state authority did not take effect immediately upon passage of the Staggers Act. A grace period was provided in which state standards and procedures were deemed to be certified for 120 days following the effective date of the Act, during which time the states were to submit their procedures for certification. The ICC had a further 90 days to pass upon each state's request. 49 U.S.C. §11501(b)(3)(A). Thus state authority over state rates and practices did not terminate on October 1, 1980 (the effective date of Staggers), but continued until January 29, 1981.

On November 3, 1980 the ICC instituted a proceeding in *Ex Parte 388, State Intrastate Rail Rate Authority—P.L. 96-448* ("Ex Parte 388"), to implement the federal certification provisions of Section 214. Its notice stated:

"The new law requires that, on or before January 29, 1981, each State authority wishing to exercise jurisdiction over intrastate rail rates, classifications, rules, and practices shall submit to the ICC for approval standards and procedures (including timing requirements) consistent with this legislation. . . ." 45 Fed.Reg. 74571 (Nov. 10, 1980), App. at 178a.

The PUC had not sought certification when the 120-day grace period expired. Thus, on April 22, 1981, when the ICC served another decision, provisionally certifying 40 states to continue regulating intrastate railroad transportation, California was not among them. *Ex Parte 388*, 364 ICC 881, 46 Fed.Reg. 23335 (April 24, 1981), App. at 180a.

"The . . . States [including California] that did not seek certification have lost all jurisdiction to regulate intrastate rail transportation." *Id.* at 885.

This decision confirmed that California's failure to file by the statutory deadline deprived it of "*all jurisdiction*" over intrastate rail transportation. *Ibid.* (emphasis added).

States that had failed to seek certification could either take no further action, in which case intrastate rail transportation would be unregulated, or they could ask the ICC to assume jurisdiction and directly apply the provisions of the Interstate Commerce Act within California to all rail transportation. California chose the latter course. Thus, on May 11, 1982, the ICC took jurisdiction over California intrastate transportation. Its order stated:

"Six States [including California] asked us to assume jurisdiction Consequently, the Commission shall assume jurisdiction over intrastate rail transportation in those States upon publication of this notice in the Federal Register. Rail carriers in these States shall comply with [ICC] regulations such as the filing of intrastate tariffs with us." *Ex Parte* 388, 365 ICC 700, 701, 47 Fed.Reg. 20220 (May 11, 1982), App. at 188a.

D. Further PUC Hearings: October 1980—May 1981.

In October and November 1980, the PUC held further hearings in the reopened commuter rail service case. The hearings took place during the statutory grace period. Up to this point no order had actually required SP to institute the service. At the hearings, County and Caltrans continued to press for an order compelling SP to devote a critical portion of its rail plant to profitless local services, notwithstanding the fact that such an order would directly conflict with the federal standards and procedures that were binding on states under Stagers. Immediately following the conclusion of the hearings, County reversed its position, found that the service request would not provide cost effective transportation, and withdrew. Caltrans persisted and offered to pay SP the deficits.

On April 7, 1981, two months after the statutory grace period had expired for filing for certification with the ICC, the PUC directed SP and Caltrans to negotiate and submit an agreement covering facilities, services and subsidy and also reinstated its order in Decision 91847 to construct commuter stations and to publish a tariff covering the requested commuter service. Decision 92862 (unreported), App. at 73a; Decision 92863, 5 Cal.PUC.2d 773, App. at 82a. On May 7, 1981, SP

filed a petition for rehearing and immediate stay pointing to the passage of the Staggers Act and California's loss of jurisdiction as a result of its failure to file for certification.* On May 22, 1981, the PUC stayed the provisions directed at SP, "pending further review of this matter." Decision 93118 (unreported), App. at 100a. The only requirement not stayed was that SP and Caltrans should proceed with their negotiations.

Putting aside the Staggers Act preemption, the foregoing PUC decisions contained errors in the critical findings of public convenience and necessity required by state law which SP believed warranted correction. In a further effort to resolve the matter under state law, SP filed on July 16, 1981 a petition for writ of review with the California Supreme Court, S.F. No. 24316, *Southern Pacific Transportation Company v. Public Utilities Commission*, raising the lack of basis for public convenience and necessity findings because of County's repudiation of the service proposal. SP's petition informed the California Supreme Court of SP's federal preemption claims based on Staggers but reserved the federal question for decision by the federal courts. SP's petition was denied by minute order dated December 23, 1981. The PUC continued its stay of operative provisions in the challenged orders.

E. The PUC's Unsuccessful Attempt to Challenge the Constitutionality of Staggers: December 1980—November 1982.

The reason the PUC had stayed its orders and did not seek to exercise the authority which it claimed to possess, other than to ask SP and Caltrans to keep negotiating, was that the PUC and SP were then litigating the Staggers Act preemption issue in federal court in Texas.

On December 12, 1980, the State of Texas had filed suit challenging specifically the constitutionality of Section 214; that is, the preemption by the ICC of state authority over intrastate rail transportation. *Texas v. United States*, No. A 80 CA 487 (W.D. Texas). On December 23, 1980, the PUC intervened in

* Rehearing was denied on June 16, 1981. Decision 93211 (unreported).

the Texas litigation. On January 6, 1981, the PUC advised SP by letter that "the [PUC] is challenging the Staggers Act as unconstitutional and . . . the [PUC] believes that California law is still valid and should be complied with." App. at 287a.

SP thereupon intervened in the Texas litigation in support of the constitutionality of the Staggers Act and filed, jointly with two other railroads, a motion for summary judgment. On April 21, 1981, the PUC filed, jointly with the states of Texas, New York, Tennessee, and Kansas, a cross-motion for summary judgment. The PUC motion challenged the constitutionality of Section 214 of Staggers; however, nothing in its motion suggested that the reach of the Staggers Act differed as between passenger and freight services, or requested a ruling that, even if freight services were found to be constitutionally regulated by Staggers, passenger services should be held exempted.

The Texas court ruled on November 3, 1982, that "for the reasons ably presented in the briefs and arguments of Defendants and Defendants' Intervenor, that Defendants and Defendants' Intervenor are entitled to judgment in their favor as a matter of law . . . and that those above-cited motions filed by Plaintiffs' Intervenor should be denied." App. at 247a.

The PUC has not appealed from that decision. (Texas and several other parties did appeal: *Texas v. U.S.A.*, No. 82-1693 (5th Cir., argued September 27, 1983)).

F. The Basis for SP's First Appeal to This Court: The "Service Order" Case.

While the Texas motions were pending, SP continued its discussions with Caltrans, advising Caltrans that it would be willing to operate a demonstration commuter train service, provided SP was fully compensated as directed by Congress in Staggers. Caltrans could either agree to pay revenue-adequate compensation, in which case SP's opposition would be withdrawn, or it could conclude that the price was beyond its budget and withdraw its request as County had done. In either event,

the controversy would be moot. It thus appeared probable to SP that the matter would be resolved at the state level, without the necessity of any further constitutional challenge.

Caltrans ultimately concluded that it would not pay the revenue-adequate compensation requested by SP, and instead requested the PUC to restore a timetable directing SP to implement the requested commuter service. On June 2, 1982, the PUC dissolved its stay and ordered SP to commence constructing stations and to file its passenger train tariff. Decision 82-06-045 (unreported), App. at 115a. In October 1982, the PUC modified its orders and directed the start-up of service on a particular schedule.² Decision 82-10-031, (October 6, 1982) (unreported), App. at 125a and Decision 82-10-041, (October 18, 1982) (unreported), App. at 131a. The summary judgment motions were still pending in Texas.

SP petitioned for rehearing of the service order, arguing that complete jurisdiction over intrastate transportation had vested in the ICC, effective May 11, 1982, as a result of the ICC's decision in *Ex Parte 388*, described above. SP's petition asserted that assumption by the ICC of jurisdiction expressly terminated California's power to require carriers to provide transportation—freight or passenger.

Rehearing was denied by the PUC. A petition for writ of review, S.F. No. 24525, *Southern Pacific Transportation Company v. Public Utilities Commission*, was filed with the Supreme Court of California. The California Supreme Court's denial of that petition on August 18, 1983, affirmed the PUC's position that Staggers does not encompass intrastate passenger service, and it is appealed here. Thus, the first question squarely presented to this Court is whether California erred in holding that the PUC continued to retain jurisdiction to order intrastate rail passenger transportation notwithstanding the complete loss of "all jurisdiction" by California on January 29, 1981 "to

² The authority sources relied on by the PUC include California Civil Code Section 2169 (obligation of common carriers) and Public Utilities Code sections 761, 762, and 763 (authority to order new services). Decision 91847, *supra*, at 731. Though not specifically cited, Section 486 of the Public Utilities Code is that requiring the filing of tariffs for intrastate services with the PUC.

regulate intrastate rail transportation" (*Ex Parte No. 388, supra*, 364 ICC at 885) and the ICC's assumption of exclusive jurisdiction over California intrastate rail transportation on May 11, 1982 (*Ex Parte 388, supra*, 365 ICC at 701).

G. SP's Federal Suit For Injunctive Relief: June 1982.

Meanwhile, in response to the PUC's June 2, 1982 order dissolving the stay and ordering construction of stations and filing of tariffs, SP had filed an action June 15, 1982, in the United States District Court for the Northern District of California seeking to enjoin the PUC from attempting to order the proposed service on the grounds that Stagers had deprived California of any authority to order the service. *Southern Pacific Transportation Company v. Public Utilities Commission*, No. C-82-3074 MHP. However, that action was dismissed without reaching the fundamental question of Stagers' preemption. App. at 250a. The court concluded instead that SP's claim of federal preemption had been before the California Supreme Court in S.F. No. 24316 and the California Supreme Court's minute order of December 23, 1981 denying review served as a final adjudication on the merits for *res judicata* purposes. The court then held that SP's failure to seek review in this Court at that time thereafter barred SP from raising the issue anew in another forum.

SP appealed the decision to the United States Court of Appeals for the Ninth Circuit, which, on September 27, 1983, sustained the district court, again without reaching the merits of the preemption issue. *Southern Pacific Transportation Co. v. Public Utilities Commission*, No. 82-4466, (filed August 19, 1982), App. at 261a. Mandate was entered on October 24, 1983, and certiorari is being sought from this Court. SP's petition challenging the application of *res judicata* will be filed with this Court on or before December 22, 1983.

H. Commencement of the Service and Filing of Tariffs: October 1982—December 1982.

Because it was unsuccessful in its attempt in federal court to stop the PUC's efforts to institute the commuter train service, SP, under protest, complied with the PUC's order and commenced operating the commuter trains for Caltrans on October 18, 1982.

At this juncture, SP was faced with a dilemma. The PUC had directed SP to file tariffs for the commute service with the PUC. The ICC, on the other hand, as of May 11, 1982, when it assumed "all jurisdiction" over intrastate rail transportation in California, had directed SP to file all intrastate tariffs with the ICC. *Ex Parte 388, supra*, 365 ICC 701. SP concluded that regardless of the origin of the service, and regardless of whether the PUC directives were valid or invalid, so long as the trains were running it was a violation of federal law to do so without a tariff on file at the ICC covering the service that SP was providing.

SP therefore compiled a tariff which was consistent with Staggers in providing revenue-adequate compensation for the commuter services that were being performed for Caltrans. Because SP designated Caltrans, rather than individual riders, as its customer, SP had to obtain special permission from the ICC to accept the tariff for filing. This was granted by the ICC Special Permission Board, over the protests of Caltrans, on November 10, 1982. Special Tariff Authority No. 83-1876, App. at 190a. Next, Caltrans requested the ICC's Chief of the Section of Tariffs to reject the tariff. This request was denied. Caltrans then asked to have the tariff suspended and investigated by the ICC. The ICC denied that request. Caltrans took an immediate appeal to Division 1 of the ICC, but was unsuccessful and the tariff thereupon became effective December 2, 1982. Suspension Case No. 70965, *California Special Train Service, Southern Pacific*, Notice (December 1, 1982) (unprinted), App. at 192a. Caltrans thereafter filed a petition for reconsideration and a recount of the vote of Division 1, arguing that the tariff should have been deemed suspended and investigated by the ICC. Division 1, in a unanimous opinion, denied the Caltrans petition on January 17, 1983. Suspension Case No. 70965, *California Special Train Service, Southern Pacific* (unprinted), App. at 194a. The tariff is in effect and on file today at the ICC.

On October 19, 1983, Caltrans filed a formal complaint at the ICC (Docket No. 39595) seeking a finding that the tariff is unlawful. The matter is pending.

I. The Basis for SP's Second Appeal to This Court: The "Contempt" Case.

The second appeal in this case arises from SP's implementation of its ICC tariff. To ensure that the service would not be operated indefinitely without payment, SP had included in its ICC tariff a provision that charges due under it be periodically paid, or service would be temporarily suspended until Caltrans paid past due bills. Caltrans not only refused to recognize the tariff; it refused to honor SP's bills. As a result, on February 7, 1983, SP officers temporarily suspended the commuter service for non-payment, as permitted by the ICC tariff.

On the same day, Ventura County, the cities of Simi Valley and Oxnard, and a number of individual commuters obtained a temporary restraining order from the U.S. District Court for the Northern District of California requiring restoration of the service. *County of Ventura v. Southern Pacific Transportation Company*, No. C-83-0581-TEH. Two weeks later the temporary restraining order was dissolved, and the complaint was dismissed for lack of jurisdiction.

The PUC undertook to punish SP and the corporate officers who authorized the service suspension, Denman K. McNear and William S. Weber, and on February 17, 1983, the PUC held SP, McNear and Weber in contempt and fined them \$16,000. Decision 83-02-079, (unreported) App. at 146a. The PUC subsequently reduced the fine to \$1,000, but denied a petition by SP, McNear and Weber for rehearing. Again raising Staggers Act preemption issues, SP appealed to the California Supreme Court, on June 2, 1983. S.F. No. 24573, *Southern Pacific Transportation Company, et al. v. PUC*. The denial of that petition, by minute order entered September 14, 1983, is the second decision of the California Supreme Court which is the subject of this joint appeal. The denial again places California in the position of claiming that, despite the

clear language of the Interstate Commerce Act, as amended by Staggers and as implemented by the ICC, California can continue to regulate rail passenger service and to punish those who seek to exercise conflicting rights recognized by the ICC.

J. Suspension of the Commute Service: March 1983.

Well before the California Supreme Court entered its decision in the contempt proceeding, Caltrans concluded that the uncertainty surrounding its liability for charges for the Caltrain service warranted temporary suspension. Accordingly, on March 11, 1983, the PUC issued its own order authorizing temporary suspension, but expressly retained jurisdiction to restore the service. Decision 83-03-027, App. at 155a. The PUC reiterated its finding that public convenience and necessity require the trains; it reasserted its claim of jurisdiction over compensation and directed SP to hold the vacant commuter stations in readiness for resumed operations on further order of the PUC.

The PUC decision of March 11, 1983, and SP's ICC tariff permit only temporary suspension. Seeking a permanent termination of any obligation to operate the intrastate passenger trains, SP filed a petition with the ICC on February 9, 1983, in Finance Docket 30123, *Southern Pacific Transportation Company Discontinuance of Passenger Train Service in Ventura and Los Angeles Counties, CA* ("Docket 30123"). By a decision served December 2, 1983 in Docket 30123, App. at 197a, Paul Clerman, Administrative Law Judge for the ICC, granted SP's petition for authority to permanently discontinue the passenger train service between Oxnard and Los Angeles.

In his decision, Judge Clerman specifically held that the ICC has jurisdiction over the discontinuance proceeding under 49 U.S.C. § 11501(c) (Section 214 of the Staggers Act). After carefully reviewing the applicable statutes and their legislative history, he concluded that Staggers does encompass rail passenger service, that the ICC in fact has taken jurisdiction over this matter, and that even the *possibility* that the PUC will require SP to perform the commuter service in the future creates an unreasonable burden on SP and, thus, on interstate commerce. Docket 30123, Slip Opinion, pp. 7-9, 23-24, App. at 210a-211a.

As a consequence of the decisions of the California Supreme Court upholding the PUC's conduct and orders in defiance of the Staggers Act, the Staggers Act preemption has been rendered null and void in California. Whereas elsewhere in this country, non-certified states are precluded by Staggers from attempting to exert jurisdiction over intrastate rail transportation, California continues to claim jurisdiction. It apparently considers itself unaffected by either the Texas District Court's judgment of November 2, 1982, denying the PUC's challenges to Section 214 of the Staggers Act, or the decisions of the ICC depriving California of jurisdiction and assuming jurisdiction itself. These appeals seek to terminate California's claim of continuing jurisdiction over intrastate rail passenger service and to vacate the convictions of SP, McNear and Weber.

SUBSTANTIALITY OF THE QUESTIONS PRESENTED

I.

THE DIRECT RESULT OF THE DECISIONS BELOW IS TO OBSTRUCT AND FRUSTRATE THE STAGGERS ACT OF 1980

If California—or any other state—can successfully create an enclave in which States are protected from federal preemption, the national purposes and objectives of the Staggers Rail Act of 1980 will effectively be frustrated.

A. The PUC Has Affirmatively Relinquished Its Jurisdiction Over Intrastate Rail Transportation to the ICC.

The Staggers Act of 1980 gave an ailing railroad industry a charter for survival based upon the freedom to determine the business uses to be made of rail properties and the prices to be charged for rail services. In Staggers, Congress found that in the past railroads had been over-burdened with costly and inefficient regulation. Congress adopted a new rail transportation policy which allows railroads, to the maximum extent possible, to establish their own rates based on competition and the demand for services. 49 U.S.C. 10101a.

Under Staggers, the only authority left to state agencies to regulate intrastate rail transportation is to be exercised "exclusively in accordance with the provisions" of the Interstate Commerce Act, as amended by Staggers. 49 U.S.C. §11501(b)(1). Even then, Staggers *only* allows a State to exercise jurisdiction over intrastate rail rates, classifications, rules and practices if the ICC determines that its "standards and procedures are in accordance with the standards and procedures applicable to regulation of rail carriers by the [Interstate Commerce] Commission." 49 U.S.C. §11501(b)(3)(A).

California failed to seek certification of *any* of its standards and procedures and thereupon lost jurisdiction over "intrastate rates, classifications, rules, and practices." 49 U.S.C. §11501(b)(4)(A). Indeed, California *requested* that the ICC assume jurisdiction over California intrastate rail transportation, and the ICC took jurisdiction on May 11, 1982.

B. The ICC's Jurisdiction Includes Rail Passenger Service.

In order to insulate itself from Staggers, the PUC has suggested that its request to the ICC to assume jurisdiction pertained only to freight, and not passenger, matters. There is no basis in the Staggers Act for bifurcating the ICC's jurisdiction. 49 U.S.C. §11501(b)(4)(A).

First, wherever the Staggers Act amendments to the Interstate Commerce Act refer to "rates" this includes, by definition, both freight rates and passenger fares. 49 U.S.C. § 10102(21). Reference to "transportation," by definition, includes locomotives, cars, yards, facilities, instrumentalities, or equipment of any kind related to the movement of passengers or property, as well as services relating to the movement of passengers, and property. 49 U.S.C. § 10102(25). When California lost authority to issue orders requiring reasonable intrastate "transportation" (49 U.S.C. § 10501(c)(1)) that loss included, by the terms of the statute, both passenger and freight transportation.

Second, the ICC treated the California request as encompassing all rail transportation; its May 11, 1982 decision assumes "jurisdiction over intrastate rail transportation." *Ex Parte 388, supra*, 365 ICC at 701. As a result, any residual authority in the PUC to require intrastate service of any kind was extinguished. This is clear from the general jurisdictional delineation established in 49 U.S.C. §10501 reserving to the states police power "to require reasonable intrastate transportation" *unless* the transportation is subject to the jurisdiction of the ICC pursuant to a denial of state certification. 49 U.S.C. §10501(c)(1).³

Finally, had the PUC'S requested division been effective, the result would still have been to *deregulate* California passenger matters and to deprive the PUC of jurisdiction, because California failed to seek certification of any standards and procedures for regulating passenger services. 49 U.S.C. §11501(b)(4)(A).

ICC Administrative Law Judge Clerman summed up the matter succinctly when he said:

"Unless it is presumed that the Congress was exceedingly careless in the drafting of section 214 of Staggers, and that the Commission has been equally careless in the implementation thereof, the conclusion is warranted in light of the foregoing [analysis of relevant statutes] that rail passenger operations are within the purview of the statute [§11501]. . . . In other words, where the Commission in its decisions in *Ex Parte No. 388* has made the finding that a State, such as California, has 'lost all jurisdiction to regulate intrastate rail transportation', that 'transportation' by statutory definition and in the absence

³ Before Staggers, the Interstate Commerce Act had read:

"This subtitle does not affect the power of a State, in exercising its police power, to require reasonable intrastate transportation by carriers providing transportation subject to the jurisdiction of the Commission under this subchapter." 49 U.S.C. §10501(c).

Section 214 of Staggers added:

"[unless] (1) the transportation is deemed to be subject to the jurisdiction of the Commission pursuant to section 11501(b)(4)(B) of this title—" 49 U.S.C. §10501(c)(1).

of affirmative indication to the contrary must be taken to include also rail passenger operations." Docket 30123, Slip Opinion, *supra*, at 9, App. at 210a-211a.

C. The California Supreme Court's Denial of SP's Petition Frustrates Congress' Intent in Enacting Staggers.

The effects of the Staggers preemption were fully briefed before the Supreme Court of California in S.F. No. 24525, which challenged the PUC's order to institute the commute service and which is the first appeal brought here. The California Supreme Court's denial of review constitutes a final judgment on the merits, including federal constitutional issues. *Napa Valley Co. v. Railroad Commission*, 251 U.S. 366, 372 (1920); followed in *Pacific Tel. & Tel. Co. v. PUC*, 600 F.2d 1309, 1315-1316 (9th Cir.), *cert. denied*, 444 U.S. 920 (1979).

California has thus ruled that the Staggers Rail Act of 1980 will not apply to intrastate rail passenger service operated in California. That the basis for the California Supreme Court's ruling cannot be determined is immaterial; as noted in *Napa Valley*, though it appeared "the court instead of hearing refused to hear, instead of adjudicating refused to adjudicate" *Napa Valley Co. v. Railroad Commission*, *supra*, at 371, the lack of explanation on issues fully briefed and essential to decision does not "detract from its efficacy as a judgment upon the questions presented. . . . *Id.* at 373.

The California Supreme Court's decision upholding the precedence of California regulatory statutes over the Staggers Rail Act of 1980, and upholding California jurisdiction even after it had passed to the ICC, is untenable. Congress' power under the Commerce Clause to preempt state regulation of intrastate rail transportation cannot seriously be questioned. As this Court stated in *Hodel v. Virginia Surface Mining & Recl. Assn.*, 452 U.S. 264, 276 (1981):

"The task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow. The court must defer to a congressional finding that a regulated activity

affects interstate commerce, if there is any rational basis for such a finding."

The Congressional findings here are specific:

"The conferees' intent is to ensure that the price and service flexibility and revenue adequacy goals of the Act are not undermined by state regulation of rates, practices, etc., which are not in accordance with these goals. Accordingly, the Act preempts state authority over rail rates, classifications, rules, and practice. . . .

"The remedies available against rail carriers with respect to rail rates, classifications, rules and practices are exclusively those provided by the Interstate Commerce Act, as amended, and any other federal statutes which are not inconsistent with the Interstate Commerce Act. No state law or federal or state common law remedies are available." *House Conference Report No. 96-1430, supra*, page 106.

It is apparent that the purposes and objectives of the Staggers Act will be frustrated if individual States demand, as California did here, that carriers devote critical portions of their plant capacity to profitless local passenger services demanded by parochial special interests. The fact that the legislative history does not address passenger deficit problems does not mean that the specific language of the statute, written to cover both freight and passenger transportation, can therefore be ignored.

When the words of the statute are clear, resort may not be had to the legislative history to create ambiguity. In *Wisconsin R.R. Com. v. C., B.&Q. R.R. Co.*, 257 U.S. 563, 589 (1922), it was argued that the legislative history of the Transportation Act of 1920 disclosed no intention to authorize the ICC to order general increases in intrastate passenger fares—although the Act as passed seemed broad enough to encompass that result. The Court observed:

"But when taking the act as a whole, the effect of the language used is clear to the court, extraneous aid like this can not control the interpretation. [cite]. Such aids are only admissible to solve doubt and not to create it."

D. A Reversal by This Court is Not Barred by Res Judicata.

The PUC may attempt to cloud the real issue in this first appeal by claiming that the California Supreme Court's denial of review in December 1981 of the PUC's early decisions in this proceeding was a final denial of SP's Staggers Act preemption claims, so that failure to seek review in this Court at that time foreclosed further consideration of the subject in another forum, or at another time.

The response to these contentions will be covered in full measure in the petition to be filed by SP December 22, 1983, seeking a writ of certiorari from the Court of Appeals' decision in *Southern Pacific Transportation Co. v. Public Utilities Commission*, *supra*, that *res judicata* precluded consideration of SP's preemption claims. However, in brief, *res judicata* could not be properly applied for the following reasons:

First, the early PUC decisions which the California Supreme Court declined to review in December 1981 did not order train service but only required that SP negotiate with Caltrans, with further orders contemplated should SP and Caltrans fail to agree upon the terms and conditions under which SP would operate commute trains for Caltrans. Constitutional issues arising from state administrative proceedings are not ripe for review by this Court so long as the case is still open before the agency and may be resolved on non-federal grounds. *Dump Truck Owners Assn. v. Public Util. Comm'n*, 434 U.S. 9 (1977).

Second, while even the PUC directive to SP to negotiate with Caltrans was beyond California's jurisdiction,⁴ the intrusion was not one in which "a refusal immediately to review a state-court decision might seriously erode federal policy." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 483 (1975). The *Cox* exception was patently inapplicable here because the PUC at that time had not directed SP to do anything other than negotiate with Caltrans, which can hardly be termed to "seriously erode federal policy."

⁴ Because it directed the negotiation of rates and practices. 49 U.S.C. §11501(b)(4)(A).

Third, the PUC had deferred all of the substantive provisions of its orders concerning construction of stations, filing of tariffs, and operation of trains taken while it challenged the constitutionality of the preemption of state authority in Section 214 of the Staggers Act in another forum—a challenge that would resolve whether the California jurisdictional claims had merit.⁵ No. A-80-CA-487, *Texas v. United States*, *supra*. With the PUC's constitutional challenge thus pending before the federal district court in Texas, this Court could not be expected to review a sub-issue affecting only California and the PUC.

Finally, in petitioning the State Supreme Court for review, SP specifically called the Texas litigation to the court's attention, advised it that Texas, not California, was the forum for resolution of Staggers Act issues, and declined to submit SP's arguments on Staggers to an adverse ruling by California. The issue was therefore not before the California Supreme Court and could not preclude SP's pursuing the matter in federal court. *England v. Medical Examiners*, 375 U.S. 411 (1964).

There was no bar to SP's raising the Staggers Act preemption issue in the two appeals before this Court. Because the California Supreme Court has refused to recognize in its subsequent decisions that Staggers Act preempts, this Court must reverse those decisions.

II.

CALIFORNIA'S AFFIRMANCE OF THE CONTEMPT CONVICTIONS WAS AN IMPERMISSIBLE OBSTRUCTION OF THE STAGGERS RAIL ACT

When the PUC directed that SP file a passenger rail tariff with it, SP complied, under protest. Yet, regardless of the origin of the service, so long as the trains were running, it was a violation of federal law *not* to have a tariff on file with the ICC.

⁵ The PUC was there contesting the loss of jurisdiction generally—freight as well as passenger.

SP therefore constructed a tariff under Staggers Act standards and filed it with the ICC. The ICC allowed the tariff to become effective despite strenuous protests from Caltrans.

Once in effect, that ICC tariff had the force and effect of law (*Armour Packing Co. v. United States*, 209 U.S. 56, 81 (1908)) and only the ICC, as the agency charged with administering the federal policy, can hold any of its specific features unreasonable. *United States v. Western Pac. R. Co.*, 352 U.S. 59, 63-64 (1956). Only the ICC can adjust, vary, modify or strike down any of the tariff terms. *Burlington Northern v. United States*, ___U.S. ___, 103 S.Ct. 514, 522, 74 L.Ed 2d 311, 319 (1982).

The ICC tariff contained, as one of its provisions, the right to temporarily suspend service for non-payment of charges named in the tariff. Caltrans specifically objected to this provision during the suspension proceedings, but its objections did not prevail. And, so long as the tariff was in force, SP had the right and the duty to collect its lawfully assessed charges. *Southern Pac. Trans. Co. v. Commercial Metals*, 456 U.S. 336, 344 (1982).

Caltrans' refusal to recognize the ICC tariff, and its refusal to pay any of the charges provided under it, were grounds for suspension of service under the tariff until Caltrans paid. There is no rule in any jurisdiction which permits a patron of a utility or common carrier to decide for itself that it will not pay the tariff charges and still have a right to uninterrupted service.

For suspending service pursuant to the ICC tariff, SP, McNear and Weber were declared in contempt of the PUC under Section 2113 of the Public Utilities Code. The affirmation of their conviction by the California Supreme Court, through its denial of review, is a holding by California that the Public Utilities Code takes precedence over the Staggers Rail Act of 1980, a conclusion which is in direct conflict with the language of the Staggers Act, and the actions taken by the ICC to implement it within California. The PUC order fining SP

and its executives for exercising rights arising out of the Staggers Act stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," and must be annulled. *Jones v. Rath Packing Co.*, 430 U.S. 519, 526, 540-541 (1976) quoting from *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

The PUC may again attempt to stop this Court from reaching the real issue by raising the claim of *res judicata* based on the December 1981 denial by the California Supreme Court of SP's petition on the early decisions. *Res judicata* is inapplicable for all of the reasons previously given, but—even more importantly—because the facts presented in the contempt proceedings were new and thus were not and could not have been raised in 1981.

The first new fact was the ICC's assumption of jurisdiction over California intrastate rail transportation on May 11, 1982. Prior to that date, the ICC had no jurisdiction over California intrastate rail transportation matters. On that date, the ICC assumed complete jurisdiction over all California intrastate rail transportation matters and directed the California rail carriers to file their intrastate rail tariffs with the ICC.

Second, pursuant to its order of May 11, 1982, the ICC accepted SP's tariff without suspension or investigation. Neither of these events had occurred when the California Supreme Court denied SP's petition in 1981.

There is no dispute that SP acted strictly in accordance with the provisions of the ICC tariff in temporarily suspending service for non-payment. The California Supreme Court's approval of the PUC order convicting SP and two of its officers for invoking the provisions of the federal tariff approved an impermissible obstruction of the purposes and objectives of the Staggers Rail Act of 1980, and cannot stand.

CONCLUSION

The minute orders of the California Supreme Court in S.F. No. 24525 dated August 18, 1983, and in S.F. No. 24573 dated September 14, 1983, should be reversed and set aside, with instructions to vacate the contempt convictions of SP, Denman K. McNear, William S. Weber affirmed in No. 24573, and to annul the orders of the Public Utilities Commission affirmed in No. 24525, purporting to exercise jurisdiction over California intrastate rail transportation after May 10, 1982.

Dated at San Francisco, California this 12th day of December, 1983.

Respectfully submitted,

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